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AUTHOR Hyman, Ronald T.
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ABSTRACT

The educational views of former Justice Lewis Powell as expressed in his legal opinions during his 15.5 years on the U.S. Supreme Court are addressed in this paper. Powell's written legal opinions on the need for maintaining discipline and order in the classroom, upholding the authority of school boards to determine curriculum, the importance of the teacher as role model, and the overall value of individual education to society are discussed in relationship to his educational theories. A conclusion is that Powell holds conflicting educational viewpoints that do not serve as a consistent progressive or traditional model for educators. A recommendation is made for educators to understand the combination of educational theories espoused in his legal opinions. Extensive footnotes are included. (LMI)

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# Supreme Court Justice Powell as Educational Theorist

Ronald T. Hyman

Rutgers University

New Brunswick, N. J.

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In deciding education law disputes which come before them for review, the justices of the United States Supreme Court express publicly their legal views relating to the law and education. In addition they often reveal their own personal beliefs and theories regarding education itself. For example, within the framework of their legal decisions the justices have expressed their personal views on such matters as the educational value of studying the Bible for its literary and historic qualities and the influence of the learning environment on the behavior of the teacher.

There is not always a bright line separating the justices' legal views from their educational views. Justices do not label their remarks as legal or educational when they move from one to the other. For example, Justice Powell in a concurring opinion in Edwards v. Aguillard writes, "As a matter of history, school children can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if school children were taught the nature of the Founding Father's [sic] religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government."[1] Even without an explicit label, however, it is not difficult to distinguish between an educational



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opinion, as in the first sentence above from Powell, and a legal opinion, as in Powell's second sentence above.

While much comment has appeared on the legal views of the justices relating to education, almost nothing has appeared concerning their educational views which seem to underpin those legal views. This article addresses the educational views of former Justice Lewis Powell as expressed in opinions -- some in majority opinions, some in concurring opinions, and some in dissenting opinions -- during his fifteen and a half years on the Supreme Court (January 7, 1972 - June 26, 1987).

The choice of Powell as the focus for this analysis stems from the realization that Powell's experience prior to his appointment to the Supreme Court made him particularly sensitive to educational issues. Powell was the head of the Richmond, Virginia Board of Education from 1952 to 1961. He later served for several years on the Virginia State Board of Education. He also served at one time as the President of the Richmond Family Services Society. Therefore, because of his previous activities it would appear that Powell had formed some definite opinions on the topic of education and came to the Court with experience in deciding educational policy issues.

During his tenure as an associate justice on the Supreme Court, Powell wrote opinions on such varied educational issues as the need for establishing discipline and maintaining order in the classroom, the authority of school boards to determine curriculum, the teacher as role model, and the overall value of a person's education to society. As the following analysis shows, Powell provided specific personal

comments on these issues, demonstrating a mixture of progressive and traditional views on education.

Since virtually all of it is dedicated to educational opinions, Powell's brief concurring opinion in New Jersey v. T.L.O.[2] provides an excellent starting point for analysis. In T.L.O. Powell supports the majority's decision that the search by a school administrator of a high school student's pocketbook was a reasonable one. Thus, the Court did not permit the exclusion of discovered evidence of drug dealing in a juvenile delinquency proceeding under a claim of violation of T.L.O.'s rights according to the Fourth Amendment even though the administrator had only "reasonable cause" and not probable cause to conduct a search.

Powell begins his opinion by stating that "the special characteristics of elementary and secondary schools...make it unnecessary to afford students the same constitutional protections"[3] which adults have. He does not proceed to list or categorize these special characteristics, but he does treat some of them. Regrettably, he does not always show how these characteristics are special to the school. For example, he is correct in stating that students spend many hours in school. However, the length of time may not be special since students also spend many hours at home, in their local recreation centers, in summer camps, day camps, and in church activities. Furthermore, though he claims students and teachers know each other "quite well,"[4] he neither supports the assertion nor shows that such close knowledge is a special characteristic of schools. Indeed, he may well be in error when asserting that students know each

other and their teachers quite well. Especially in high school and particularly in a big high school where students and some teachers float from room to room during the day, students and teachers may barely know more than two to four other people quite well. Few students know their teachers quite well in terms of knowledge of their personal or even professional lives. Thus, Powell may be resting his legal opinion on educational claims that may neither be true nor special about schools.

Powell also contrasts the relationship between teacher and student with the relationship between law enforcement officer and student. In schools, he claims, there is a "commonality of interests" between teachers and students and the typical teacher takes a "personal responsibility for the student's welfare."[5] Law enforcement officers, in significant contrast to teachers, have an "adversarial relationship" with students.[6] Powell's claim about the commonality of interest in the teacher-student relationship suggests an educational goal or an ideal more than a description of the reality existing in many high schools. The pressures by the public and professional educators for achievement in learning in today's schools which result in more homework and stricter grading of assignments and tests, the enforcement of bureaucratic regulations regarding tardiness, dress, smoking, and noise, and the legal requirement for teachers to report instances of alcohol and other drug uses, have caused many students to view their teachers as adversaries. Moreover, some law enforcement officers (for example, child abuse investigators and social workers dealing with teenage parents) may be more pro-student than the

teachers whom Powell characterizes as having a degree of familiarity with their students "that is unparalleled except perhaps in the relationship between parent and child."[7]

Powell's most provocative educational claim in T.L.O., however, is one regarding pedagogy. After Powell reasserts the commonly held legal view that the state has a compelling interest in the education of its young citizens, he states, "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."[8] From his perspective as a parent, lawyer, and judge, Powell espouses a "discipline first" theory which separates discipline and order from education. He constructs a linear, sequential relationship with a clear logical progression from discipline to education. Powell uses his theory to justify his approval of strong administrative control of the schools as a means of fulfilling the school's "primary duty,"[9] which is the "education and training of young people."[10] (Note that Powell does not offer any distinction between the concepts of education and training.)

Close consideration of Powell's "discipline first" educational theory from the perspective of a teacher calls into question its validity for several reasons. First, Powell goes beyond the moderate claim by Justice White, who says in his majority opinion for T.L.O., that "maintaining order in the classroom has never been easy."[11] Indeed, some teachers would disagree even with White, saying that discipline is not at all a difficulty in teaching. Moreover, the act of beginning to teach is one way to establish discipline and maintain order. In the classroom, as in other situations where groups of

people are not paying attention to the leader in charge, one effective way to gain the students' attention is simply to begin doing the assigned task. Under this theory of teaching, accepted and implemented by many, if not most, seasoned teachers, discipline and order are not the focus of the classroom nor the prerequisites for educating students. Rather, they are the consequences of the teacher's efforts to teach.[12]

Most important, the very acts of establishing discipline and maintaining order are educational acts. The teacher who sets about to establish discipline and maintain order <u>is</u> teaching the students -- <u>is</u> educating them. The teacher by all the acts he or she performs teaches that a student in school is expected to follow rules, that rules are necessary for positive social interaction, that the teacher is the person in authority as sanctioned by the community, that learning is desirable intrinsically and extrinsically, and that learning is done best when order rather than chaos exists. The messages, implicit and explicit, conveyed by the teacher when establishing discipline are themselves the rudiments of education for social living which is theoretically what the school seeks to teach. From this perspective, the establishing of discipline does not precede the beginning of education but is precisely its beginning. For these reasons Powell's "discipline first" theory is questionable at the very least, if not invalid, from an educator's perspective.

Be it invalid or not, Powell's educational theory in <u>T.L.O.</u> is not at all surprising. The existence and need for prerequisites in law abound in matters of proper procedure. For example, the police must

notify people of their constitutional rights (Miranda warnings) before they question them if the answers given are to be used as evidence in court. Thus, the "discipline first" theory which establishes discipline as a prerequisite for education fits well with legal procedural theory and its prerequisites. Indeed, the discipline first theory may well be the reflection of Powell's legal mind rather than the underpinning for his legal opinions.

Powell's "discipline first" theory is also not surprising because, although it is more extreme, it is at least consistent with the view of Justice White as expressed in his T.L.O. majority opinion. It is also consistent with the view of Justice Blackmun as expressed in his separate concurring opinion in T.L.O. which quotes the "discipline first" sentence and, in fact, only that sentence from Powell's opinion.[13] Finally, it is consistent with previous Powell opinions. The two most notable of these are Ingraham v.Wright[14] and Goss v. Lopez.[15] Moving backward in time from 1977 to 1975, let us now look at these two opinions.

Powell wrote the majority (5-4) opinion in Ingraham, a case dealing with the disciplinary paddling of two Dade County, Florida junior high school students in October, 1970. While this case deals directly with physical punishment of a student in contrast to T.L.O. which deals only with search and seizure along with a subsequent suspension from school, Powell devotes comparatively little attention to the educational theory supporting the Court's opinion on school discipline. He writes mostly to support the opinion that the Eighth Amendment, which prohibits cruel and unusual punishment, does not

pertain to students. Nevertheless, the little that exists in Ingraham on educational theory reveals Powell's view of the school as an institution.

Powell's main support for permitting the paddling[16] of students is his stated belief in the "openness of the public school."[17] According to Powell, the school, an open institution, and the prison, a closed institution for involuntary incarceration, are wholly different. Moreover, Powell believes that the Eighth Amendment was meant to apply only to prisons and other closed institutions. Therefore, because of the history of the amendment and previous court decisions and because "schools are open to public scrutiny,"[18] the Eighth Amendment does not apply to them.

The openness of the public school is indeed questionable. Though schools serve the public, they are mostly off limits to adults. In many schools, visitors, including parents, are not frequent, nor are they particularly welcome. The school is the domain of the staff, not the public. The staff and the administrators often consider parents as personae non gratae, or obtrusive, or disruptive of the routines of the school.

Additionally, sociologist Erving Goffman in his 1961 pre-Ingraham book Asylums[19] shows that the school shares many, if not most, of the characteristics of such total institutions as prisons, mental hospitals, and army camps. These institutions are generally considered as closed. One critical characteristic is compulsory participation, though compulsion is not always the case for patients in mental hospitals and soldiers in army camps. Since involuntary

participation is an essential characteristic of the prisoner whom Powell wishes to distinguish from the student, Powell's admission that attendance in school "may not always be voluntary"[20] weakens, or even contradicts, his argument.

To bolster his position that the schools are open institutions Powell claims that except for the very young, students are "not physically restrained from leaving school."[21] However, the fact is that when 14-year-old Ingraham refused to be paddled, he was physically held, "struggling face down across a table" by two male teachers while the principal "administered at least twenty licks."[22] Nevertheless, Powell holds that the school is open, and the students are free to leave when they wish. It is this contrast between Powell's image of the school as an open institution and the reality as seen by others that leads one expert in education law to conclude that schools are not as Powell envisions them.[23]

The view of the schools presented by Powell in Ingraham is essentially an idealistic one. It portrays the schools as friendly, open, and voluntary institutions governed with the loving discipline which is associated with the parent-child relationship. This portrayal might seem strange at first. However, his favorable view is understandable and even necessary if we consider his strong support for the discretion of administrators to run their schools without intercession by the courts. Indeed, Powell argues in Ingraham that there is no need for "administrative safeguards of prior notice and hearing"[24] which will protect against arbitrary disciplinary punishment.

Earlier in Goss, Powell objects to the "unprecedented intrusion"[25] of the courts into the daily operations of the schools. He says, "Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process."[26] Therefore, given this view on the need for administrative independence from the courts, Powell in Ingraham would be expected to depict the schools in a most positive light. In such a light he can reject Ingraham's claim that the Eighth Amendment applies to public schools in order to protect students.[27] In essence, then, Powell does not shift away from his earlier Goss dissent, to which we now turn, nor his future concurrence in T.L.O.

In Goss, Powell wrote the dissenting opinion joined by Chief Justice Burger, Justice Blackmun, and Justice Rehnquist. Powell objects to the majority's holding that an Ohio statute, insofar as it allowed the suspension of a student from school for up to ten days without notice or a hearing, violated the Due Process clause of the Fourteenth Amendment.

Powell bases his dissent in Goss on his educational views that "education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write."[28] He goes on to state that a student who does not learn the "meaning and necessity for discipline"[29] suffers a handicap. Moreover, educators render a student a "disservice"[30] in not disciplining that student if sanctions are deserved. This is so, Powell believes, because today's schools bear a "heavier

responsibility"[31] for inculcating values than previously. Powell goes so far as to justify discipline in terms of its "relevance to the social compact."[32] Finally, but not least significantly, Powell quotes with approval Black's dissent in Tinker that "school discipline, like parental discipline, is an integral and important part of training our children to be good citizens--to be better citizens."[33]

From the Goss dissent there is little doubt that Powell believes that becoming a well-disciplined, obedient student is proper training for life. He also believes that schools need the freedom to discipline students routinely even if that means the loss of the foundation of due process for students--the giving of notice and the holding of a hearing. As stated above, Powell prefers to maintain the schools' independence by keeping the courts out of them. It is not that "maintaining order and reasonable decorum"[34] is a "major educational problem."[35] Rather, Powell believes that school discipline by educators is fundamentally necessary so that students will learn the "lesson of life."[36] He believes that the school best serves the students by teaching them "the lesson of discipline."[37] It is here in the Goss dissent where Powell plants the seeds of the "discipline first" theory which blooms explicitly in T.L.O. Powell characterizes the role of the teacher as multifaceted. The teacher is "educator, adviser, friend, and, at times, parent-substitute."[38] Powell states that the ongoing relationship between the teacher and the student is "rarely adversary [sic] in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher

must be free to discipline without frustrating formalities."[39] Nevertheless, via the Goss dissent by not supporting the need for notice and a hearing prior to a suspension, via the Ingraham majority opinion by not supporting a minimal due process procedure as being necessary prior to disciplinary paddling, and then via the T.L.O. concurrence by supporting the search and seizure of a student on less than probable cause, Powell helped create the opposite of his claims that there is a nonadversarial relationship between teacher and student.[40] That is to say, because of the Court's rulings students now must be circumspect in their behavior, as well as eternally vigilant, in order to protect themselves from their teachers who have broad powers over the students in their efforts to establish discipline and maintain order.

The Goss dissent may, therefore, offer the most revealing look at Powell's educational views because it presages the opinions which follow in the next twelve years. In supporting the need for discipline in the schools and rejecting the need for procedural safeguards (notice and a hearing) for suspensions up through ten days, Powell establishes his theory regarding discipline. His view of the majority's decision and his prediction of the likely consequences of the safeguards it grants are so negative that he thinks "the federal courts should prepare themselves for a vast new role in society."[41] His subsequent opinions are certainly consistent with his educational view and with his legal view about students' rights as expressed here in Goss.

As mentioned earlier, Powell's educational views are not restricted to issues concerned with discipline. His opinions have addressed a range of educational issues. To understand his views on other aspects of education it is necessary to examine several more of his opinions. Powell wrote the majority opinion (5-4) in Ambach v.Norwick,[42] a case dealing with a New York law requiring a person to be or to become a citizen of the United States in order to receive certification as a teacher. In supporting New York's law against a claim under the Equal Protection Clause of the Fourteenth Amendment, Powell states that public school teaching is a task "that go[es] to the heart of representative government,"[43] that it "fulfills a most fundamental obligation of government to its constituency."[44] Justice Powell draws upon Brown v. Board of Education[45] regarding the important governmental function which education performs in arguing that teachers "play a critical part in developing students' attitude [sic] toward government and understanding of the role of citizens in our society."[46]

Powell's major educational concept underpinning his Ambach opinion concerns modeling. For Powell, classroom teachers are "role models"[47] for the students with whom they are in daily direct contact. As such, "teachers by necessity have wide discretion over the way the course material is communicated. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving...goals."[48] The recognition and emphasis that the

teacher is a model of the democratic adult combined with the recognition that commercially prepared teaching materials still require the personal touch of committed teachers qualifies Powell as having some enlightened views on education. Surely, Powell's position speaks against the "teacher-proof" standardized materials so popular with curriculum reform committees seeking a "top-down" implementation of new material. His citation of Dewey's liberal Democracy and Education to characterize the public school as an "assimilative force" in a "democratic political system" stands out in this context.[49]

Linked to his view on the importance of the individual teacher is Powell's recognition that classroom teachers do indeed make discretionary professional decisions daily. His respectful opinion of the teacher's work runs contrary to the view of many teachers who claim nonaccountability because they are only implementing decisions made by administrators or boards of education. By emphasizing the teacher as decision maker, in addition to emphasizing the teacher as role model, Powell is in tune with reform-oriented educators who advocate less centralization of curricular decisions and a greater voice to individual teachers.

On the other hand, the very same section of Powell's majority opinion which contains the above views manifests characteristics of a traditional view. Powell recognizes the teacher's professional discretion in deciding the method for communicating course material established as part of the curriculum. He implicitly holds to the traditional position that teachers should and do teach what they are directed to by the syllabi approved by their respective boards of

education. (He explicitly states that it is the board of education which determines the curriculum in Edwards.[50] See below.) His comments do not take into account the point insightfully made by Marshall McLuhan that the decision on how to communicate is a decision on what to communicate.[51] The medium influences the message significantly. A board of education sets policy and approves syllabi and textbooks but the teacher is no mere neutral communicator of preselected subject matter and values. Teachers select and emphasize, as well as add and subtract from the syllabus, as they give their "personal" touch. They very much participate in determining what students learn.

Furthermore, Powell's use of the terms "inculcation"[52] and "preservation"[53] when he treats the topic of society's values and his use of the word "presenting"[54] when he considers the subject matter which public schools teach their students are also indicative of a traditional stance. They bespeak Powell's establishment and management background as a board of education leader at the local and state levels. (A person with a nontraditional viewpoint on teaching might use such words as "teaching," "discussing," "examining," and "inquiring" when dealing with the topics of subject matter and society's values.)

Powell's unique admixture of progressive and traditional stances leads to the holding in Ambach that New York State may require all teachers, not just teachers of civics and history courses, who wish to be certified to be citizens of the U.S.A. in order to preserve the values which are at the core of American democracy. Since the teacher

is a role model with subtle professional discretionary power in deciding how to teach the future citizens of our country, Powell sees a need for the teacher to be completely committed to this country, not just as a resident but as a person willing to have a political stake in the larger community. Only such a role model will be willing to inculcate and preserve the traditional values of American society. Powell's broad concept of the teacher, who does much more than teach subject matter be it arithmetic, Spanish, biology, or reading, and his stance on preserving our democratic traditions thus underpin his support of the New York law requiring teachers to be or to become American citizens if they wish to educate our youth--"perhaps the most important function of state and local governments."[55]

Powell's educational views also include a concern that all children receive the benefits of a free public school education. This is so even though Powell delivered the majority opinion in San Antonio Independent School District v. Rodriguez,[56] a case in which the court explicitly states that education is not a fundamental right under the Constitution. In San Antonio Powell writes, "We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to society' cannot be doubted."[57] However, his educational view is not strong enough to lead him to find in the Constitution that children have a fundamental right to a free public education. Powell's traditional view on civil rights and his strict interpretation of the Constitution do not permit him to consider education, which is not explicitly mentioned in the Constitution, to be on the same level as the

fundamental rights of free speech and free exercise of religion which are explicitly mentioned in the First Amendment. Thus, the standard for reviewing Texas' legislation for funding its schools is the "reasonable test," a low one which the state is able to meet.

Powell, nevertheless, reaffirms his support, albeit non-constitutional, for a free public education nine years later in a concurring opinion in Plyler v. Doe,[58] a case in which the majority opinion written by Justice Brennan prohibited the State of Texas from denying undocumented alien children access to its free public schools. In Plyler Powell again employs language which is indicative of a mixed educational viewpoint. Powell recognizes that no one gains from an illiterate subclass of people. He states that the lack of education leads to the problems and costs attendant upon "unemployment, welfare, and crime."[59] He recognizes the need for educating youngsters who are likely to remain in our democratic society. This point harks back to his progressive view in Ambach that the school is an assimilative force. On the other hand, the negative consequences of illiteracy for Powell are described with a traditionalist's terms -- unemployment, welfare, and crime-- rather than with such terms as loss of human potential and actualization of natural talents.

No matter. Whatever the justification may be for a free public education, Powell is definitely supportive of education, even for noncitizens and illegal aliens. In Plyler the State of Texas attempts to exclude children of illegal aliens completely from its public schools whereas in San Antonio it attempts only to maintain a funding

program based on local property wealth. That is, the legal issue in Plyler concerns the Equal Protection Clause of the Fourteenth Amendment, which applies to all residents in our country, whereas the legal issue in San Antonio primarily concerns the fundamental right to an education. Therefore, in Plyler Powell's educational view does not conflict in any way with his views on fundamental constitutional rights. For this reason Powell now finds constitutional support for his educational view.

Powell recognizes that some schooling for illegally admitted children, even if it is funded at a lower and allegedly inequitable level as permitted by San Antonio, is an absolute necessity. It is necessary not only for the children who are likely to remain in the United States but also for the general American society because the negative consequences of a lack of education are destructive to the political, economic, and social aspects of democracy which Powell wishes to preserve. That is, Powell sees the lack of education in residents as contributing to conditions which weaken our economy and political system. Indeed, Powell asserts that, contrary to the claim made by the State of Texas, provision of education to everyone is very much in the interest of the state in the long run. It is worth noting that in discussing how much young people can be influenced, Powell writes (in the same year as Plyler), albeit within the context of a criminal case, "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage."[60] Thus, the benefits of

education may be considered as long-term ones which preserve democracy, and Powell strongly and explicitly advocates them.

Finally, it is necessary to refer to two cases to illustrate Powell's views on curriculum. In Board of Education, Island Trees Union Free School Dist. v. Pico[61] Powell wrote a dissent from the majority opinion prohibiting a local board of education from removing allegedly objectionable books from the secondary schools' libraries. Powell defends the position that it is the right of the local board of education to govern a community's schools and to determine "the educational policy of the public schools."[62] For Powell it is the school board (that is, parents and other concerned citizens) not the judiciary which is the proper agency to decide what to teach in the public schools.

Powell reiterates this point later in Edwards v.Aguillard, decided just one week before his retirement. Powell concurred with the majority opinion which held The Louisiana Balanced Treatment for Creation-Science and Evolution-Science Act to be violative of the Establishment Clause of the First Amendment. Powell writes "separately to note certain aspects of the legislative history, and to emphasize that nothing in the Court's opinion diminishes the traditionally broad discretion accorded state and local school officials in the selection of the public school curriculum."[63] That is to say, Powell writes in order to demonstrate a consistent and persistent educational view held over the fifteen years he served as an associate justice. He once again asserts that the local school board does and should control what is taught in the public school.

In Edwards Powell takes his last opportunity on the Court to offer his own personal view on the vexing issue of the appropriate place of religion in the curriculum. In the paragraph continuing his legal and educational thoughts about teaching religious beliefs quoted at the beginning of this article, Powell asserts that "since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events."[64] In a footnote he states that the then-current "political controversies in Northern Ireland, the Middle East, and India cannot be understood properly without reference to the underlying religious beliefs and the conflicts they tend to generate."[65] Not only does Powell want the public schools to teach about religion, but he states that given previous Supreme Court decisions in Abington School District v. Schempp [66] and Stone v. Graham [67] he sees "no constitutional problem"[68] in the schools doing so.

In conclusion, it is fair to state that the education views of Justice Powell remains consistent during his fifteen years on the Supreme Court. Probably he had formulated some definite views on education before his appointment to the Court, as suggested earlier, and maintained those views during his entire tenure. Perhaps because of his early experience as a member of his local and state boards of education Powell remained steadfast in believing that it is the authority of a board of education, as the prototype of democratic governmental agencies, to determine curricular policy for its schools. He said so explicitly several times, and he joined Chief Justice

Burger's majority opinion in Bethel v. Fraser (which refers to Powell's opinion in Ambach) stating, "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[69]

There is a little disagreement among educators, reformers as well as their opponents, that Powell's position about the authority of a local board of education is correct legally and valid educationally. Only extremists among teachers believe that professional educators rather than local or state board of education members should determine the curriculum policy of the local schools. Disagreement about the validity of Powell's view of the local board of education as the curriculum decision maker arises only when a local board tolerates or promotes a racist, sexist, or other discriminatory viewpoint. Given his position on the religious issue in Edwards in which he supports local control in general but opposes it specifically when the board of education violated the Constitution, it seems appropriate to conclude that Powell would restrict a local board only when it manifestly breaks a constitutional or statutory provision about discrimination, equal protection, free speech, or accepted due process.

Over the years Powell also maintained -- even strengthened -- his position that educators and board of education members deserve respect and obedience from students. For Powell, respect for authority and obedience to school rules are all important. His unwillingness to countenance a challenge to the authority of educators and the board in Ingraham, his opposition to a "challenge" by "rebellious or even merely spirited teenagers" in Goss,[70] his fear of a "challenge" by a

14-year-old[71] child to a "decision to remove a book from the library" in Pico,[72] and his "discipline first" theory in T.L.O. suggest that Powell consistently holds an authoritarian rather than a democratic viewpoint regarding discipline, order, obedience, and rules in schools.

Powell's extreme view on discipline stands in contrast to his expressed views about the teacher as role model and about the necessity of preparing young people to be literate citizens or residents in a democracy, as indicated above. His views on discipline, order, obedience, and rules, were they implemented in the schools with the fervor he expressed in his opinions, would most likely be counterproductive in achieving the educational goals of the school to prepare open, reflective, active citizens. Powell's position on discipline and order (including corporal punishment) necessitates a tight control of the students and might well yield students who are closed, unthinking, angry, and/or docile. Such negative characteristics are not those of people most apt to continue the democratic society which Powell clearly wants to preserve.[73]

In short, Powell, like many others of us, apparently holds some conflicting viewpoints on education. Perhaps he would be able to resolve the apparent conflicts in his educational theory were he to set forth a fuller exposition of his ideas. Perhaps not. As expressed in his written opinions, his education theory does not serve as a consistent progressive or traditional model for educators who read and study him. Therefore, educators may not wish to follow him as a model, but they would do well to understand the combination of

theories of education which he espouses in his legal opinions. Powell's education theory, incomplete as it is when presented in Supreme Court opinions, serves as an underpinning to support several significant legal opinions on education concerning discipline and constitutional rights. We are still living with its influence.

FOOTNOTES

1. 482 U.S. 578, 107 S. Ct. 2573, 2589, __L.Ed. 2d__, [39 Ed. Law 958] (1987).

2. 469 U.S. 325, 105 S. Ct. 733, 83 L.Ed. 720 [21 Ed. Law 1122] (1985).

3. Id. at 348. Without citing Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed. 2d 731 (1969), Powell appears to be borrowing from Justice Fortas' majority opinion in that case. See Tinker at 506.

4. Id.

5. Id. at 350.

6. Powell, without citing himself, repeats in T.L.O. the same terms he uses in his dissent in Goss v. Lopez, 419 U.S. 565, 591-594, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975). See infra.

7. T.L.O. at 348.

8. Id. at 350.

9. Id.

10. Id.

11. Id. at 339.

12. For a parallel with coaching in athletics see the article on disciplining the Notre Dame University football team in The New York Times, November 28, 1988, p.C3.

13. T.L.O. at 352.

14. 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 2d 711 (1977).

15 See supra footnote 6.

16. Ingraham at 657: "Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principal's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days. Andrews was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week." For a comprehensive update on corporal punishment see Messina, "Corporal Punishment v. Classroom Discipline: A Case of Mistaken Identity, 34 Loyola L. Rev. 35 (1988). For an easily accessible article by the director of the National Center for the Study of Corporal Punishment and Alternatives in Schools see 66 Phi Delta Kappan 39.
17. Id. at 670.
18. Id.
19. Erving Goffman, Asylums (Garden City, N.Y.: Doubleday, 1961).
20. Ingraham at 670.
21. Id.
22. The original panel opinion of the Fifth Circuit gives greater details about the paddling than the Supreme Court. See 498 F.2d 248, 256 (1974).
23. Levin, "Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School," 95 Yale L.J. 1647, 1676 (1986); see also Rosenberg, "Ingraham v. Wright: The Supreme Court's Whipping Boy," 78 Columbia Law Review 75 (1978).

24. Ingraham at 678.

25. Goss at 585.

26. Id. at 591.

27. Note that the National School Boards Association submitted an amicus brief in Ingraham supporting the claim that the Eighth Amendment does not apply to the schools.

28. Goss at 593.

29. Id.

30. Id.

31. Id.

32. Id.

33. Id. quoting Justice Black in Tinker at 524.

34. Id. at 591.

35. Id. at 592.

36. Id. at 593.

37. Id.

38. Id. at 594.

39. Id.

40. For more on this point see Levin, supra, footnote 23.

41. Goss at 599.

42. 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed. 2d 49 (1979).

43. Id. at 75.

44. Id. at 76.

45. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 2d 49 (1979).

46. Ambach at 78.

47. Id.

48. Id.

49. Id. at 77.

50. Edwards supra footnote 1.

51. Marshall McLuhan, Understanding Media:The Extentions of Man (New York: McGraw Hill, 1964).

52. Ambach at 77.

53. Id. at 76.

54. Id. at 78.

55. Id. at 76 quoting Brown at 493.

56. 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed. 2d. 16 (1973).

57. Id. at 30.

58. 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed. 2d. 786 [4 Ed. Law 953] 1982.

59. Id. at 241.

60. Eddings v. Oklahoma, 455 U.S. 104, 115, 102 S.Ct. 861, 71 L. Ed. 2d 1(1982).

61. 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed. 2d 435 [4 Ed. Law 1013] 1982.

62. Id. at 893.

63. Edwards supra footnote 1 at 597.

64. Id. at 607.

65. Id.

66. 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963).

67. 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed. 2d 199 (1980).

68. Edwards at 606.

69. 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed. 549 [32 Ed. Law 1243] (1986).

70. Goss at 593.

71. It is interesting to note that Powell uses a 14-year-old child as his straw man in Pico in light of the fact that the case deals with libraries in both junior and senior high schools whose students range in age from 12 to 18. Recall that James Ingraham was 14 years old at the time of his case against Wright.

72. Pico at 895.

73. For an excellent analysis of Ingraham and a trenchant commentary on Powell's "undercurrent of authoritarianism" as well as his support for "unquestioning obedience" see Rosenberg supra footnote 23 at 97.